Martin, Disiere, Jefferson & Wisdom

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TEXAS INSURANCE LAW NEWSBRIEF

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APPRAISAL UMPIRE EXCEEDED AUTHORITY AS TO ONE CATEGORY OF DAMAGES, BUT ERROR DID NOT INVALIDATE ENTIRE AWARD

The Fifth Circuit last Tuesday ruled that an umpire should not have unilaterally removed a set of repairs from a final appraisal award, but concluded that the remainder of the reward was enforceable, and the insurer was not in breach of the policy because it paid the appraisal award plus the agreed amount for the repairs that the umpire improperly excluded. In *TMM Investments, Ltd. V. Ohio Casualty Insurance Co.*, No. 12-40635, 2013 WL 5222625 (5th Cir. Sept. 17, 2013), the insured, a shopping center, had refused the insurer's payment of an appraisal award resulting from a hailstorm claim. After the insurer's appraiser and the umpire agreed on an amount of loss, the umpire while drafting the final award struck an agreed amount for damage to the insured's heating, ventilation, and air conditioning system. The insurer tendered the amount of the award plus the amount of the HVAC system that the umpire removed. The insured took issue with the appraisal process and the ultimate award, rejected the tender, and filed a declaratory judgment action in state court.

The insurer removed to federal court and the Federal District Court for the Eastern District of Texas ruled that the appraisal award should be set aside finding the umpire's removal of the HVAC portion award was improper and also finding the umpire and the insurer's appraiser should not have considered causation and coverage issues. The Fifth Circuit agreed the HVAC portion of the award was improperly deleted, but nevertheless reversed, finding that the error did not taint the remainder of the award. An umpire is not empowered to unilaterally modify an award where there is no disagreement — here, the amount for the HVAC was not in dispute between the appraisers selected by the parties. There was, however, no issue raised by any party concerning the propriety of the remainder of the award. The Fifth Circuit therefore held that the appraisal provision of the contract should be enforced as to the portions of the appraisal award unrelated to the HVAC system.

The Fifth Circuit further held the District Court erred in concluding that causation was outside the purview of the appraisal panel. Relying on the Texas Supreme Court's opinion in *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009), the Fifth Circuit stated that "[a]t the very least … appraisal panels are within their rights when they consider whether damage was caused by a particular event or was instead the result of non-covered pre-existing perils like wear and tear." Thus, the appraisers properly considered causation of the alleged damages. Because the appraisal award was valid, the insurer's tender of the appraisal amount plus the HVAC amount fulfilled the terms of the contract and the district court's judgment to the contrary was reversed.

NORTHERN DISTRICT COURT DISMISSES BAD FAITH CASE AGAINST STATE FARM AFTER PLAINTIFF FAILS TO MEET FEDERAL PLEADING REQUIREMENTS

A plaintiff in a homeowner's first-party bad faith suit was ordered to re-plead in order to meet the federal pleading standards, but the so-called "Amended Complaint" in fact amended little and did not set forth sufficient facts to withstand State Farm's motion to dismiss. In *Radenbaugh v. State Farm Lloyds*, Cause No. 4:13-CV-339-A, — WL — (N.D. Tex. August 16, 2013), the plaintiff alleged breach of contract plus statutory and common law extra-contractual claims arising out of State Farm's handling of a fire claim. State Farm removed the case from Palo Pinto County to the Federal District Court for the Northern District of Texas, and a month after removal the Court ordered the plaintiff to re-plead, expressly calling the plaintiff's attention to the applicable federal rules of civil procedure and noting that they differ from the Texas pleading rules.

The plaintiff re-pleaded but only "with slight modifications" to his state court petition. The court noted that some of the changes were "cosmetic only," and that the amended pleading was "basically … a repeat" of his state court petition. State Farm therefore moved to dismiss for failure to state a claim for which relief could be granted. The district court first analyzed the plaintiff's contract claim. The court noted that the cause of action as pleaded was devoid of "factual specificity," and that the 18 paragraphs relating to the contract claim failed, for example, even to allege that State Farm ever issued a policy to the plaintiff. Because the plaintiff did not allege the exact nature of the contract, did not describe State Farm's obligations under the contract, did not identify how State Farm allegedly breached the contract, and did not attempt to show how any breach of the policy caused damages, the court found the pleadings defective.

The court noted the failure of Plaintiff's contract claim should be "fatal" to all of plaintiff's remaining extra-contractual claims. However, the court continued its analysis of the pleading noting that the allegations under the insurance code constituted merely "formulaic recitations of the statutory provisions." Plaintiff's pleadings relating to breach of the duty of good faith and fair dealing failed to allege damages separate from the contract, which are required under Texas law. Finally, Plaintiff's DTPA claim both was premised on recovery under the Insurance Code, and again failed to include any factual information. The court therefore dismissed all claims, and refused to give the plaintiff another chance to re-plead because the plaintiff had provided no excuse for not complying with the federal rules in his first attempt to re-plead.

Editor's Note: MDJW is grateful to State Farm for the opportunity to defend its interests in this lawsuit.

E-MAILS SHOWING LEISURE TRAVEL & CONTINUED PRACTICE OF LAW SUPPORT CARRIER TERMINATING ATTORNEY'S DISABILITY BENEFITS

The Fifth Circuit recently reversed a district court's decision that an attorney's disability benefits were improperly cancelled holding the disability plan administrator was within its bounds to rely on a series of e-mails sent to the plan administrator by a former romantic partner of the attorney. In *Truitt v. Unum Life Insurance Company of America*, No. 12-50142, 2013 WL 4777327 (5th Cir. Sept. 6, 2013), the plaintiff stopped working in 2002 contending that she could no longer travel or repeatedly lift boxes weighting more than 25 pounds. She received disability benefits but the plan administrator notified her that it would continue review of her claim and might discontinue benefits if it received information that she was no longer disabled.

The plan administrator continued to obtain medical information concerning the plaintiff, and conducted surveillance. Having reviewed surveillance that showed her engaging in activities inconsistent with her reported 15 hours of "daily bed rest" and after obtaining an IME suggesting she could continue sedentary work, the plan administrator terminated benefits in 2006. It reinstated the benefits in 2007 after a further review of the file. The plan administrator terminated benefits again in 2009 after receiving and reviewing more than 600 pages of e-mails by a person identifying himself as having been in a personal relationship with the plaintiff for a number of years. The e-mails, which the Fifth Circuit excerpted over multiple pages of its opinion, documented extensive global leisure travel, participation in a lawsuit including trial, and apparent intent to deceive the plan administrator.

The plaintiff responded to the termination of benefits with an affidavit stating that she had been assaulted by an informant and that the informant was a computer "hacker" who had pleaded guilty to assault after allegedly choking her. The plan administrator stood by its decision and an administrative appeal and lawsuit followed. The district court concluded that the plan administrator's reliance on the e-mails was "arbitrary and capricious" and granted judgment based on the administrative record.

The Fifth Circuit panel reversed and remanded. First, the court held that the administrator was not under a duty to investigate the accuracy of the e-mails. The district court's holding that there was such a duty was contrary to settled authority that an administrator in Unum's position is not required to "reasonably investigate" a claim and that the proper analysis is limited to whether the record supports the administrator's decision. Second, the panel stated that there was no duty on the administrator to "consider the source" of the information used to reach its decision. Third, the panel noted that the administrator did not rely solely on the e-mails, but also on surveillance and the opinions of multiple medical experts. Finally, the panel reinstated the plan administrator's counterclaim for more than $1 million in benefits previously paid and remanded for further proceedings.

2013 MDJW North Texas Insurance Seminar

October 18, 2013

Irving, Texas

Join Chris Martin, Jack Wisdom, Mark Dyer, Barrie Beer, Alan Moore, George Lankford, Leslie Echols Pitts, and several of the Firm's other leading insurance lawyers for a FREE one day seminar to examine many of the cutting edge claims handling, coverage and trial strategy issues confronting Texas insurers today.

Irving Convention Center
500 W Las Colinas Blvd
Irving, TX 75039

Registration 7:30 a.m. – 9:00 a.m.
Seminar 9:00 a.m. – 4:45 p.m.

6 hours of CE and CLE credit
Continental Breakfast and Lunch provided

As of 9/30/2013, this event is full
You may send an email to ce@mdjwlaw.com to be added to the waiting list